

Candide, or Pessimism: Fighting Piracy and Transnational Crime in Uncharted Waters

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The views expressed in this article are those of the author alone and do not necessarily reflect the views of the Norwegian Immigration Appeals Board.

Abstract

While Somali pirates have been dominating the headlines in recent years, piracy and armed robbery at sea represents a widespread phenomenon throughout the world's most traveled waterways. Having a piracy problem in one's "maritime backyard" exposes the inadequacy of the coastal state's patrolling and prosecutorial capacity and adds to the incentives of criminal enterprises to operate in the area. In order to contain the threat posed by piracy, various national and international efforts at patrolling and policing the oceans, and prosecuting pirates, have been initiated—often, however, without capturing the root causes of the problem. While the UN Convention on the Law of the Sea (UNCLOS) defines specific acts of piracy, it does not include financing and other "secondary activities", which typically create and sustain piracy networks. This article argues that regarding pirate activities through the lenses of transnational organized crime may provide a more adequate basis for addressing piracy.

Introduction

In the renowned work by Voltaire, *Candide*, or *Optimism*, originally published in French in 1759,¹ Voltaire sets out to contrast Leibnizian optimism,² where "all is for the best in the best of all possible worlds", with a more realist, if not disillusioned world view. While "optimism" in Leibniz' work usually refers to the classical sense of "optimal", not the mood-related sense of being positively hopeful, and hence does not stand in direct opposition to the contemporary meaning of "pessimism", contrasting the two nevertheless illustrates opposing points of view in an ongoing debate. Contemplating piracy and transnational crimes, optimists may claim that "all is for the best", i.e. that domestic and international efforts at

fighting those crimes are optimal, or "as good as it gets." Pessimists may point to the enormity of the task considering the sheer extent of the problems and resort to capitulation ab initio. While the former point of view would surely be overly optimistic, adopting the latter seems to suggest itself as more appropriate in the face of globally rising rates of piracy and transnational crimes committed. Considering concerted efforts directed at preventing and prosecuting piracy and other transnational crimes, and a greater willingness to address the root causes of these menaces, resorting to pessimism appears to be equally premature. But an effective response may depend on sailing uncharted waters. To be sure, piracy is not equivalent to transnational crime, though it may share most of the characteristics of the latter. Furthermore, piracy is not always or necessarily related to waterways in general or the High Seas in particular, as is commonly assumed, since it may also refer to criminal acts committed against aircraft, persons, or (other) property outside the jurisdiction of any

¹ *Candide*, ou l'Optimisme, published simultaneously in five countries that year.

² Established in particular in *Théodicée*, published in 1710, where Gottfried Wilhelm Leibniz asserted that all apparent imperfections in the world in fact are optimal in the sense of representing the best possible in the best of all worlds

state. Here, however, the focus will be on maritime piracy as defined in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS 1982), i.e. on “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship ... and directed: (i) on the high seas, against another ship ... or “against a ship ... outside the jurisdiction of any State” (UNCLOS 1982: Art. 101).

While similar to piracy in many regards, armed robbery against ships pertains to such acts happening “within a State’s jurisdiction over such offences” (IMO 2009a). However, where the main problems in fighting the respective underlying crimes against persons or property consist of the lack of jurisdictional approaches taken, i.e. in the near absence of states having promulgated and enacted laws against such illegal acts, assuming jurisdiction, and actually prosecuting and punishing perpetrators committing those crimes, armed robbery at sea may, in effect, pose challenges similar to those of piracy. Therefore, while this article will, in the main, focus on piracy, examples of armed robbery at sea will also occasionally be related, especially where its consequences may be regarded as sharing equally descriptive characteristics of transnational crime as may be true of piracy. In the face of a profound lack of jurisdictional approaches developed based on UNCLOS provisions, alternative legal bases would be desirable. If piracy could be subsumed under the definition of transnational organized crime included in the UN Palermo Convention of 15 December 2000, prosecutorial options in regard piracy would multiply. Hence, in the following I will first outline common characteristics of transnational crime and evaluate how far piracy may fit that description, followed by juxtaposing the threat of piracy off the coast of Nigeria with the one off the coast of Somalia, as representatives of different ends of the weak state-failed state continuum. I will then turn to looking into regional and international efforts and arrangements aimed at preventing and punishing piracy, before attempting to assess to what degree the above actions may be regarded as successful in the fight against piracy.

Is Piracy a Transnational Crime?

Few things delight an international jurist more than being asked whether piracy may be considered a transnational crime, as it allows for responding with that perhaps most revered of all replies in the business of the law: “it depends”. Employing the definition included

in the United Nations Convention against Transnational Organized Crime (UNTOC), an offense is transnational in nature if: (a) it is committed in more than one State; (b) it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; (c) it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or (d) it is committed in one State but has substantial effects in another State.

Looking at the above list, offenses related to piracy are often committed in more than one State (a). Furthermore, an act of piracy usually involves preparation and planning in a state different from the locus of the actual attack. Most pirate endeavours never would have seen the light of day without supplying equipment and funds, and acquisition of, e.g., rocket-propelled grenades and other sophisticated assault hardware, which tends to have its origin in various, other countries (b) and is mainly procured with the help of organized criminal groups engaged in criminal activities in more than one State (c). Finally, in a way the “one-size-fits-all” category, it seems fair to assume that acts of piracy may have substantial effects in another State (d). In fact, due to the mere disruption of international shipping and the concomitantly increased costs, which eventually will have to be paid, inter alia, by consumers in the various countries of destination, piracy may have a major impact on a global level and thus, in any case, would satisfy the criteria set out in (d). The estimates of direct and indirect costs of Somali piracy alone range from USD 1 billion to USD 16 billion due to significantly increased insurance premiums, avoidance (i.e., choosing the alternate route around the Cape of Good Hope, which adds roughly 3,500 miles to the journey), and deterrence (e.g., heightening onboard security, deploying frigates, etc.) (Chalk 2008: 16).

Of course, employing a narrow construction of the transnational nature of a crime, piracy would always fall outside that definition from the outset, based on the requirement of the crime having been committed in one, or more than one, State, as piracy has been defined as an offense taking place on the High Seas, or in any other place outside (the jurisdiction of) any State (UNCLOS 1982: Art. 101). Armed robbery against ships, on the other hand, would not generally be excluded from the above definition (provided the other requirements are fulfilled).

However, apart from the at times unconvincing division between armed robbery at sea and piracy on the High

Seas with a view to the, in many respects, similar criminal acts involved, such a narrow reading of the nature of piracy overlooks or disregards the fact that acts of piracy consist of more than the mere attack on another vessel, its crew etc., on the High Seas. It often (most prominently perhaps in the case of piracy off the coast of Somalia) involves forcing a captured ship into the territorial waters of a State, (especially where that territorial state is too weak to enforce the law within its territory), perhaps unloading its cargo, illicitly trading in its cargo, taking hostages, exerting ransoms, *mutatis mutandis*. Hence, piracy usually consists of more than whatever takes place on the High Seas; in effect, the various, distinguishable acts ultimately combine to form the (one) act of piracy. Recognising that without those other (partial) acts taking place within the jurisdiction of at least one state, and often also ashore, the respective act of piracy would not be successfully completed, but reduced e.g. to the mere act of capturing a vessel, also piracy may be regarded as a transnational crime.³ As may be clear from the above, in any event, the proper definition of the transnational nature of a criminal activity depends on the particular circumstances of the case. Finally, taking into account that piracy, in part, if not in the main, involves acts taking place on the High Seas, outside the jurisdiction of any state, it may to a certain extent be regarded as the ultimate transnational crime—transcending all boundaries and hence going even further than the traditional concept of the transnational nature of a crime: piracy as an “ablative”⁴ crime. If so, subsuming piracy under the definition of transnational organized crime included in the Palermo Convention has farther reaching consequences. The Convention obliges States Parties to criminalize participation in an organized criminal group, corruption, the laundering of the proceeds of crime, and the obstruction of justice⁵ (UNDOC 2000: Arts. 5, 6, 8, and 23). It thus focuses on so-called “enabling” or “secondary ac-

tivities” characteristic of organized crime, as opposed to the “primary activities”, i.e. the underlying core crimes (Hauck and Peterke 2010: 420). Adopting such an approach with respect to piracy and armed robbery at sea would have the advantage of not confining the reach of the law to those actually taking part in a specific pirate attack, but targeting everyone contributing to the piracy endeavour, from the one’s providing logistics and assault weapons to the “silent shareholders” and financiers—provided they could be linked somehow to the (transnational) organized crime committed. The Convention does not lay down a legal definition of that term; it merely stipulates that “organized criminal group” shall mean a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit” (UNDOC 2000: Art. 2a). The “structured group” shall not be randomly formed, but neither does it need to have formally defined roles for its members, continuity of its membership or a developed structure (UNDOC 2000: Art. 2c).

Other treaties obliging states parties have employed equally broad definitions of “organized crime”. By virtue of European Union (EU) law, in particular Article 83 (1) and 87 (2) (c) of the Treaty on the Functioning of the European Union,⁶ EU Member States have committed themselves to a supranational demand imposed on their national laws to fight organized crime. According to Council Framework Decision of 24 October 2008 on the fight against organized crime, the term “criminal organization” is defined as:

a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, financial or other material benefit (Council Framework Decision 2008: Art. 1).

In sum, taking the organizational characteristics and logistical needs of pirate gangs into account, most acts of piracy and armed robbery at sea would seem to fulfil the requirements of the definition of transnational organized crime. Hence, whereas UNCLOS defines only

3 Considering that there may be a connection between terrorist and criminal groups, including pirates, further contributes to the at times opaque nature of transnational crimes. Somalia’s Al-Shabaab, designated by the U.S. government as a foreign terrorist organization in 2008, has been linked to pirates operating off Somalia’s coast (Rollins & Wyler 2010, pp. 29–30). A recent incident at a resort north of Lamu, Kenya, further underlines the shifting nature and fleeting categorization of piracy. During the armed attack, believed to be attributable to Somali pirates, a British man was shot dead and his wife kidnapped (Al Jazeera 2011).

4 Here employed to denote being removed from or elevated from “ordinary” depictions of transnational organized crime.

5 For a comprehensive study on the Palermo Convention, see McClean (2007).

6 C 115/47 (entered into force on 1 December 2009), Official Journal of the European Union, 9 May 2008.

the illegality of committing certain acts of violence, detention, or depredation (UNCLOS 1982: Art. 101), subsuming piracy under the Palermo Convention enables and obliges states to focus on the underlying (transnational, organized) criminal structures sustaining and fuelling a piracy network, thus broadening the scope and potential effect of prosecutorial counter-piracy efforts. But, as with any such efforts, while effective law enforcement starts with legislative will, it ultimately depends on enforcement capabilities. The impact of the latter on the success of fighting piracy will be illustrated in the following.

The Weak State/Failed State Paradigm

Although pirate attacks off the coast of Somalia accounted, by far, for the greatest share of all attacks in recent years, piracy is not an unknown phenomenon in the waters off Nigeria, Bangladesh, India, Indonesia, or Tanzania, and thus constitutes a serious global problem with potentially significant geopolitical repercussions. The dubious honour of being associated with a piracy-infested region increases pressure towards falling into the latter category of the weak state/failed state continuum. Having a piracy problem in one's "maritime backyard" exposes the inadequacy of the coastal state's patrolling, policing, and prosecutorial capacity, thus adding to the incentives of criminal enterprises to operate in the area, further undermining the legitimacy of an already weak government, and risking pushing it even closer to the failed state label (Syring 2011: 438).

The number of acts of piracy and armed robbery against ships reported to the International Maritime Organization (IMO) in 2010 was 489 and thus represented an increase of 20.4 % against the 406 reported incidents in 2009. During the year 2008 those numbered 306 (IMO 2011a). Yet, despite international awareness and continued attention to the problem, a decisive reversal of the trend still seems to be quite distant.

The Case of Nigeria

Based on IMO's latest Annual Report on Piracy and Armed Robbery against Ships, West Africa accounted for 47 of all reported incidents in 2010, a figure that has been quite stable over the past couple of years. The majority of those incidents occurred off the coast of

Nigeria, and its immediate maritime neighbours (IMO 2010). Nigeria is Africa's leading oil producer and one of the world's largest oil exporters (CIA 2009)⁷; yet, few Nigerians, including those living in the country's oil-producing areas, have benefited from the oil wealth, which has fuelled increasing discontent with, and violence against, the oil infrastructure (BBC 2011).

While hijackings and attacks on vessels have been a common feature, the most prominent upsurge of criminal activities in that region pertained to theft of cargo in general, and of crude oil in particular, the latter also known as illegal oil bunkering. In addition to the direct theft of cargo carrying crude oil, other types of illegal oil bunkering include small-scale pilfering for the local market, large-scale tapping of pipelines to fill large tankers for export, and excess lifting of crude oil beyond the licensed amount. While the exact amount of oil stolen per day is unknown⁸ it is estimated to range from 30,000 to 300,000 barrels, causing a loss to the Nigerian economy from 2003 to 2008 totalling approximately USD 100 billion (Asuni 2009).

According to the constitution, all minerals, oil and gas in Nigeria belong to the federal government. The possession of crude oil by an individual or group other than those licensed is punishable under the law. Notwithstanding legal provisions in place, theft of Nigeria's crude oil has been a decade-long issue and in recent years has been on the rise. Despite (or perhaps, because of) strong indications implicating top government officials, the military and some leading civilian Nigerians, none of these high-ranking individuals have been brought to account for their criminal activities so far (allAfrica 2011). New methods for identifying the particular sources of oil may contribute to curbing the sale of illicit⁹ or "blood oil". Recognizing that every drop of crude oil has its own DNA, and is different for every oil well, DNA certificates for each oil supply have been put forward as a solution, requiring authenticating papers prior to any oil transaction (This Day Live 2011). The underlying idea is that one should be able to go

7 Nigeria was ranked as number 8 in terms of oil exported, including both crude oil and oil products, with an estimated oil exported of 2, 102, 00 barrels per day (CIA 2009).

8 This is, of course, in part because the Nigerian government to date does not even have exact numbers for the amount of oil legally produced per day.

9 It is not illegal, in general, to trade (both selling and buying) in oil, though it is illegal to sell or acquire "blood oil" or "illegitimate oil". Where an illegal activity (here, trading in illegitimate oil) in other circumstances (legitimate oil) would have been legal, the illegal act is usually termed "illicit".

after both the buyers and the suppliers of illicit oil—a particularly interesting feature, considering the transnational nature of illicit trade.

While these new potential means of evidence may promote accountability for crimes associated with piracy and armed robbery against ships, an apparent lack of enforcement action, and the lack of Nigerian laws for the prosecution of offenders promises otherwise. Despite ratification, the UNCLOS has not been properly implemented and the Nigerian criminal code still lacks provisions for piracy and thus is inadequate to ensure prosecution of perpetrators of that crime, even when caught (UNCLOS 1982).

In an attempt to finally address this persistent menace, Nigeria has recently teamed up with the Republic of Benin for joint maritime patrols code named “Operation Prosperity” (Usman 2011). As part of the bilateral agreement, the first of its kind in West Africa, the Nigerian Navy will patrol the waterways of Nigeria and Benin for a period of six months, with a view to “secure the maritime environment between both countries’ territorial waters up to the outer extremities of both Exclusive Economic Zones”¹⁰ (Usman 2011).

As may be apparent from these statements, while perhaps aiming at preventing “piracy”, these measures are not exclusively designed to be employed on the High Seas, or outside the jurisdiction of any State (where piracy per definition would take place), but within Exclusive Economic Zones as well as territorial waters and hence in territory under the jurisdiction of a particular state. Furthermore, to the extent that the implication of high-ranking government and military officials cannot be eradicated, it seems premature to expect “Operation Prosperity” to succeed in eliminating oil bunkering, though it may contribute to the safeguarding of shipping lanes in the Gulf of Guinea, and off Nigeria and Benin specifically. In any case, judgment on that operation will have to be postponed.

The Case of Somalia

The almost global attention that has been accorded to Somalia in recent years has mainly been due to the fact that the failed state label suits it all too well. Thus, despite increasing international cooperation and naval-military presence, “piracy, in particular off the coast of

Somalia, continues to threaten the safety, peace, and security of one of the most-frequented waterways in the world, the states in the region, and, by extension, to disrupt the global economy” (Syring 2011: 438).

According to recent numbers, an estimated 21,000 ships pass through the Gulf of Aden on an annual basis and of the 489 acts of piracy and armed robbery against ships reported to the IMO to have occurred in 2010, 172 were committed off the coast of East Africa, predominantly off Somalia. While this number represents a decline from last year’s 222 attacks off East Africa, the decreasing number of incidents resulted in the main from the migration of the threat from Somalia-based pirates towards the Indian Ocean and Arabian Sea, where such attacks increased from 27 to 77 and from 2 to 16, respectively, compared to the previous year (IMO 2011). While domestic capacity (or the lack thereof) is not the only variable of importance in regard to curbing the threat of piracy, it has a significant impact on the prospects of fighting piracy effectively. In that sense, for all the weakness of the Nigerian state institutions and in particular its means of law enforcement, at the very least (as opposed to the case of Somalia) they are capable of providing significant naval forces and conducting patrols, even on behalf of a neighbouring state (Benin). Naval deterrence presupposes effective patrolling, which in turn is closely related to the concept of jurisdiction and law enforcement (Syring 2011: 437). Piracy, legally defined in UNCLOS as acts carried out on the High Seas, outside the jurisdiction of any (particular) state, is, for that very reason, considered to be the original universal jurisdiction crime and as such, states apprehending pirates would be able to assume jurisdiction and try pirates based on that concept (UNCLOS 1982). In practice, however, states patrolling the Gulf of Aden as part of the international naval presence off Somalia have shied away from prosecuting, sometimes even from arresting, suspected pirates due to anticipated legal difficulties of prosecution, high expenses generally attached to transporting suspects to the domestic courts of the apprehending forces, and concerns of potential asylum claims being put forward by pirates.

Some of the main concerns of states pertain to the rather small window of opportunity for catching suspected persons “in the act,”¹¹ and the problematic status of pirates. Prior to the launch, a pirate vessel may merely appear as a fishing boat and with pirates quickly disposing of weapons by throwing them overboard, any

10 According to UNCLOS (1982: Art. 57), “Exclusive Economic Zone” refers to the area beyond and adjacent to the territorial sea, “not to exceed 200 nautical miles from the baselines from which the breadth of the territorial sea is measured”.

11 There are often no more than fifteen minutes between a pirate attack being launched and the action being concluded.

evidence to the contrary soon rests safely on the seabed. On the other hand, under international law pirates are considered to be non-combatants (Kontorovich 2009), which puts, for example, further constraints on navies' "rules of engagement". Also, the modalities of apprehension may impose additional difficulties on any ensuing prosecutions, as many pirates are arrested under circumstances that resemble the battlefield conditions criticized in regard to the apprehension of many Guantánamo Bay detainees, "where evidence was not collected or preserved as required for prosecution" (Crook 2010; Savage 2010).

Furthermore, having no real government to face at home, pirates have often successfully taken their "prey" (hijacked vessels) towards the shore, into Somali territorial waters, where they would be safe from domestic prosecution as well as from international naval forces, since these forces would not be permitted to enter and exercise jurisdiction within a foreign state's territory.

Realizing these shortcomings, the UN Security Council adopted a number of enforcement action resolutions concerning the situation in Somalia. Recalling its previous resolutions with regard to Somalia (Security Council 2008a,b,c,d,e,f; 2009), in UN SC Res. 1950 of November 23, 2010 (Security Council 2010), the Security Council, acting under Chapter VII of the UN Charter, decided to renew for an additional twelve months the authorization granted to Member States in preceding resolutions, pertaining to taking action against pirates in Somali territorial waters ("hot pursuit")¹² and extending the scope of permissible military force even to certain land-based operations in the Somalia mainland.¹³ UN SC Res. 1950 also focused on holding persons suspected of piracy accountable for their acts by calling for increased efforts to prosecute Somali pirates.¹⁴ An

12 In other words, allowing pirates to be chased from the high seas into Somali territorial waters, thus preventing pirates' "hit-and-run" tactics.

13 The resolution noted that it was passed with the consent of, and following several requests for international assistance from, the Transitional Federal Government (TFG) of Somalia. Cf. Security Council (2010). UN SC Res. 1851 had noted in paragraph 6 that "States and regional organizations cooperating in the fight against piracy (...) off the coast of Somalia (...) may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy (...)" (Security Council 2008f; emphasis added).

14 In paragraph 13, the Security Council "[c]alls on all States, including States in the region, to criminalize piracy under their domestic law and favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law" (Security Council 2010; Roach 2010: 407).

ensuing Security Council resolution on Somalia, UN SC Res. 2015, adopted October 24, 2011, did not involve enforcement action under Chapter VII— in that regard UN SC Res. 1950 was still valid at the time of adoption. However, UN SC Res. 2015 emphasized several additional aspects of particular interest in the fight against piracy as a transnational crime. Apart from calling on states in its preamble to adopt domestic "provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates" and generally reaffirming the importance of national prosecutions, including the hoped-for establishment of specialized Somali anti-piracy courts, the resolution requested the Transitional Federal Government of Somalia (TFG) to:

adopt a complete set of counter-piracy laws, including laws to prosecute those who illicitly finance, plan, organize, facilitate or profit from pirate attacks, with a view to ensuring the effective prosecution of suspected pirates and those associated with piracy attacks in Somalia, the post-conviction transfer of pirates prosecuted elsewhere to Somalia, and the imprisonment of convicted pirates in Somalia, as soon as possible... (Security Council 2011b: Para. 7).

Furthermore, the resolution underlined the importance for anti-piracy courts "to have jurisdiction to be exercised over not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks" (Security Council 2011b: Para. 17).

Finally, in UN SC Res. 2020 of November 22, 2011 (Security Council 2011a), the most recent resolution concerning Somalia, the Security Council once again invoked Chapter VII of the UN Charter, and renewed authorization of enforcement action for yet another year. While "[c]ommending the efforts of the EU operation Atalanta, North Atlantic Treaty Organization operations Allied Protector and Ocean Shield, Combined Maritime Forces' Combined Task Force 151, and other States acting in a national capacity ... to suppress piracy" (Security Council 2011a: Preamble) and the prosecutorial efforts particularly in Kenya and the Seychelles, assisted, inter alia, by the United Nations Office on Drugs and Crime (UNODC), UN SC Res. 2020 in the main reiterates previous "call[s] upon States and regional organi-

zations that have the capacity to do so, to take part in the fight against piracy ... by deploying naval vessels, arms and military aircraft" (Security Council 2011a: Para. 7). Furthermore, the resolution "[u]rges all States to take appropriate actions under their existing domestic law to prevent the illicit financing of acts of piracy and the laundering of its proceeds" (Security Council 2011a: Para. 17), and stresses "the need to support the investigation and prosecution of those who illicitly finance, plan, organize, or unlawfully profit from pirate attacks off the coast of Somalia" (Security Council 2011a: Para. 20), thus acknowledging that a successful anti-piracy strategy needs to focus on far more than the immediate threat posed by pirate vessels, and extending the list of addressees from those states establishing particular anti-piracy courts, envisioned in S.C. Res. 2015 (Security Council 2011b: Para. 17), to "all states".

Whether these combined efforts at fighting piracy and transnational crime outlined in those resolutions will come to fruition remains to be seen. Given, the absence of a functioning government is but one explanation for the upsurge of piratical activities,¹⁵ as in the case of Somalia. However, with a government that lacks even the most basic means to effectively fight illicit activities at sea—and, for that matter, elsewhere—(as opposed to Nigeria, which at least has a functioning navy),¹⁶ what has been apparent from the start is that fighting piracy off the coast of Somalia would heavily depend on international naval efforts.

¹⁵ With reference to Somalia, it has e.g. been pointed out that the phenomenon of piracy as we know it today did not start immediately after the break down of the Siad Barre government in 1991. In fact, the first wave of piracy on a large scale off the coast of Somalia did not even occur until 2004-2006, cf. e.g. Hansen (2011: 489). Even piracy benefits from a certain level of order and relative "peace" ashore in the sense of "absence from total chaos", in other words from less hostile a climate than the one during the heaviest fighting in mainland Somalia during the 1990s. Otherwise, the pirate infrastructure ashore, including financing and trade in pirate goods, may not prosper. While the upsurge in piracy thus may not be easily attributable to the lack of a functioning government, a stronger link may be established between strength of government and state institutions, and effectiveness in the fight against piracy. Other explanatory variables for a piracy upsurge may be improved organizational structures among pirates, increased sophistication in terms of weapons, navigation and tracking equipment and the attraction of success (previously secured high ransoms as self-enforcing incentives).

¹⁶ To be sure, comparing the coast off Nigeria and its neighbors with the ocean off Somalia and its regional neighbors, it also has to be admitted that the Gulf of Guinea is not nearly as vast an area to patrol as the Gulf of Aden. But even so, also relatively speaking, Nigeria seems better equipped than Somalia (IMO 2009b).

Preventing Pirate Attacks: Regional and International Responses

In light of the fact that court proceedings in the majority of pirate incidents are but a distant aspiration, the IMO has pursued a three-pronged approach, aiming at enhancing individual vessels' security and alert level and increasing regional cooperation in addition to promoting international military presence, predominantly in the affected Gulf of Aden area. Thus, on 29 September, 2009, the IMO's Maritime Safety Committee (MSC) updated and revised its guidance on combating piracy and armed robbery against ships and adopted best management practices to deter and deal with attacks (IMO 2009a). These guidelines include recommendations with respect to travel routes, manning of engine rooms and lookouts, and more technical advice relating to preferred modes of communication and reporting, evasive manoeuvring tactics, and fire pump defensive measures. Despite enhanced on-board security, in the face of the still high-level security threat posed by pirates in the area, the most preferable *modus operandi* to ship owners would be to avoid piracy infested shipping lanes all together and instead employ alternative routes. However, in the case of Somalia such rerouting would e.g. involve going around South Africa, and no shipping company would want to go that extra (sea-) mile alone, carrying the extra costs to competitiveness, spending more time and fuel on a substantially longer journey, unless the majority of shipping companies collectively follow through with such plans (Aftenposten 2010).¹⁷

With respect to fostering regional cooperation and coordinating governments' action, the IMO adopted a Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (IMO 2009a). Apart from urging states to take all national legislative, judicial, and law enforcement action necessary to enable them to receive, prosecute, or extradite any suspected pirates and armed robbers arrested by warships or military aircraft, the Code was meant to be a source of best practice and "to provide Member States with an aide mémoire to facilitate the investigation of the crimes of piracy and armed robbery against ships" (IMO 2009b: Annex 1, Art. 1). Furthermore, when convening

¹⁷ That point was further underlined by the head of the Norwegian Ship Owner's Association on the occasion of a conference at the Norwegian Institute of International Affairs (NUPI). See NUPI (2010).

a meeting in Djibouti in January 2009, the IMO adopted a Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the so-called Djibouti Code of Conduct) (IMO 2009c). The signatories committed towards sharing and reporting relevant information through a system of national focal points and piracy information centres established in Kenya, Tanzania, and Yemen, interdicting ships suspected of engaging in acts of piracy and other attacks against ships, and ensuring that persons committing or attempting to commit such prohibited acts are apprehended and prosecuted.

Finally, realising that successful regional cooperation would also depend on international naval assistance, the IMO has been lobbying to bring the piracy problem to the attention of the UN Security Council (Syring 2010a), which eventually led to the adoption of the enforcement action resolutions detailed above. Based on these resolutions, states have intensified their presence, in particular in the Gulf of Aden, with the United States, United Kingdom, French, and Indian navies initially leading the way, and later on including, e.g. Chinese and Norwegian naval deployments in addition to the first-ever European Union-led naval force (EUNAVFOR) executing operation "Atalanta" (EU Council Joint Action 2008). Other international efforts include NATO's Operation Allied Provider,¹⁸ Operation Allied Protector,¹⁹ and Operation Ocean Shield.²⁰

Prosecutions for piracy related incidents have so far, however, been relatively rare. To be sure, in the wake of UN SC Res. 1851 (Security Council 2008f), urging states willing to prosecute piracy to enter into agreements with states and organizations mainly involved in patrolling and physically fighting piracy, Kenya concluded such agreements with, inter alia, the United Kingdom, the United States, and the EU (EUNAVFOR 2009), establishing itself as a hub for piracy prosecutions, with Tanzania now following suit. Eventually, as indicated in UN SC Res. 2015, piracy trials "conducted by courts in

18 In the main providing escorts to UN World Food Program (WFP) vessels transiting through the waters off Somalia and conducting deterrence patrols (October-December 2008).

19 This operation succeeded Operation Allied Provider and continued to fulfill its tasks, in addition to conducting surveillance (March-August 2009).

20 The most recent NATO operation (whose current mandate has been extended until the end of 2012) continues the former operations' tasks and contributes to overall maritime security in the region "conducting counter-piracy activities in full complementarity with the relevant UN Security Council Resolutions and with actions against piracy initiated by other actors, including the European Union" (NATO 2012).

Somaliland and Puntland²¹ are expected to reach international standards in about three years" (Security Council 2011b: Preamble) and thus should take primacy in fighting crimes of piracy emanating from the region. As of today, prosecution capacity in the region is far from sufficient. However, to date, there is no international court alternative which would have jurisdiction over piracy, and states taking part in the international naval presence have shied away from apprehending and prosecuting pirate suspects for the reasons outlined above. The emerging picture thus far has been that states engaged in patrolling the Gulf of Aden may try, if at all,²² suspected pirates who have attacked ships of those states' nationality, or with nationals of those states being affected, for example, as crew members. Where no such nexus may be established, avoidance of active prosecution seems to be the general trend.²³ Frustrated by the lack of efficient counter-piracy measures, calls for arming civilian vessels and deploying privately contracted security personnel have been on the rise; some have even argued for re-introducing capital punishment, reminiscent of the times when captured pirates had to walk the plank, as a harsh but necessary means in curbing the threat to international shipping posed by piracy (Dagens Næringsliv 2011). Irrespective of how far those putting forward such thoughts really intend to see through handing down instant death penalties as punishment for pirates, what these comments bear witness of is a profound level of discontent within the shipping industry, combined with a perhaps overwhelming feeling that any decisive enhancement to security would have to come from within the ship owners' associations.

In reaction to these concerns put forward by the shipping industry, the IMO adopted various Maritime Safety Committee circulars on interim recommendations and

21 Somaliland is an internationally recognized autonomous region of Somalia. Puntland is a region in Somalia, bordering Somaliland. Leaders of both regions have declared their territories as autonomous states, with varying degrees of international recognition. In any case, in the absence of a functioning central government, both regions enjoy de facto sovereignty. Also, Somaliland and Puntland are thought to harbor the majority of all Somali pirates.

22 Sometimes even despite the existence of such a nexus, prosecutions have been avoided. In May 2010, for example, the Russian navy released a group of Somali pirates captured a couple of days earlier in an operation to recover a seized Russian tanker, apparently due to lack of a clear legal basis for prosecuting them. See, e.g. Barry (2010).

23 That may, however, change over time. Norway, e.g., has currently no naval presence in the region. Nevertheless she is considering prosecuting pirates in Norway, if asked to, or on her own initiative. See, e.g. Aftenposten (2012).

guidelines for port, coastal, and flag states, and ship owners, ship operators, and shipmasters regarding the use of privately contracted armed security personnel (PCASP) on board ships in High Risk Areas (IMO 2011b). Underlining that “[t]he use of PCASP should not be considered as an alternative to Best Management Practices (BMP) and other protective measures” the IMO also pointed out that it was not “endorsing the use of privately contracted armed security personnel”. Therefore, in that regard, the guidelines were not meant to represent any fundamental changes of policy by the Organization. Rather, acknowledging that an increased level of threat to commercial shipping by Somalia-based pirates has led to extended use of armed guards and a marked expansion in the number of firms offering armed maritime security services, and that shipping companies may find it difficult to identify reliable, professional private providers of armed security (IMO 2011c),²⁴ these circulars were merely meant as an aid to companies and states anyways opting for employing PCASP.

Conclusion

Piracy may be regarded as a crime of transnational nature, and, to a certain extent, as the ultimate or “ablative” transnational crime—with correspondingly complex responses needed, if eradicating or at least significantly curbing its impact is at issue. Where the threat to international shipping occurs in a region with somewhat functioning, although weak, state institutions, including available national naval forces (as in the case of piracy off the coast of Nigeria), the regional state or states mostly affected may prevail in the fight against piracy by focusing on joining and coordinating their forces, and preventing pirates’ trade in illicit oil and other products illegally acquired in the course of an attack.

Where, on the other hand, a functioning government is largely absent, national naval resources lacking, and the area in need of patrolling so vast as in the case of piracy off the coast of Somalia, international naval presence represents a necessary, although far from sufficient condition. Promoting the implementation of domestic laws in various states enabling piracy prosecutions, the creation of piracy courts and education of judges in the

region as well as internationally, and the actual apprehension and prosecution of suspected pirates, in addition to enhancing the situation for people ashore, are equally mandatory for a promising approach towards fighting piracy.

States unwilling to prosecute suspected pirates, not least Western states, often cite a lack of adequately implemented international treaties or national laws pertaining to piracy prosecution, evidentiary problems (the sort of evidence acquired and the mode it had been acquired may not live up to the high Human Rights trial standard in the respective countries), and, although less readily admitted, concerns for potential asylum claims by suspected, and convicted pirates, as reasons for their refusal to prosecute. At the same time, regional prosecutorial capacities are still underdeveloped. In the face of these realities, calls for employing privately contracted armed security personnel may be understandable. However, manning civilian vessels with armed seafarers, and encouraging the use of force to fight off presumed pirates, may lead to a dangerously blurry line between civilians and combatants, while concomitantly contributing to an escalation of violence on the high seas. This inability of drawing a clear distinction had once been realized as a lethal dilemma of international law, culminating in the *Laconia* affair during World War II.²⁵ It might still be a non-commendable idea in the present circumstances.²⁶

Contemplating the current state of affairs, only concerted action involving international naval deterrence, legislative and juridical empowerment, and coordinated efforts at fighting trade in illicit goods as well as enhancing the conditions of life in the most piracy prone regions, may promise success in globally fighting piracy and related transnational crimes. Hence, not all is for the best; neither is there a need to be desperately pessimistic. But perhaps we have to follow *Candide* and further “cultivate our garden”.

Notes on Contributor

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²⁵ Pertaining, roughly speaking, to the question of whether a submarine encountering an (armed) merchant ship may treat that ship as a military vessel and its crew as combatants.

²⁶ This argument against manning civilian vessels with armed guards is based on Syring (2010b).

²⁴ In fact, the IMO cited, inter alia, the “absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing the legitimate transport, carriage and use of firearms” as reason for caution. The situation was “further complicated by the rapid growth in the number of private maritime security companies (PMSC) and doubts about the capabilities and maturity of some of these companies”.

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